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CHARLES ELMORE

IN THE

Supreme Court of the United States

NO. 210

MRS. WOODROW VIRGINIA STONE, *Petitioner*

VS.

STRICKLAND TRANSPORTATION COMPANY, *Respondent*

RESPONDENT, STRICKLAND TRANSPORTATION COMPANY'S OPPOSING BRIEF FILED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, BY MRS. WOODROW VIRGINIA STONE.

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E. Duncan & Co., Brief Printers, Dallas

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TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Strickland Transportation Company, respectfully presents this, its opposition brief, in opposition

to petition for Writ of Certiorari from the United States Circuit Court of Appeals for the Fifth Circuit, filed by petitioner in above styled matter, opposing, and in opposition to this Court granting said writ and reviewing the judgment entered by the said Circuit Court of Appeals, same being dated the 13th day of April, 1948, and rendered in Cause No. 12,219, styled Woodrow V. Stone vs. Srtickland Transportation Company.

Respondent concurs in the short statement of the nature and results of the suit on the part of petitioner in her petition, but desires to elaborate on same as follows: This suit was by Mrs. Woodrow V. Stone, an unmarried woman, against Strickland Transportation Company, a corporation, and Roy White, she contending that on the occasion in question Roy White was driving a truck belonging to Strickland Transportation Company; that he was an employee of said Strickland Transportation Company, and was acting in the course and scope of his employment as an employee of said company on the occasion in question; that he negligently drove and propelled said truck into a car in which she was riding, resulting in serious, permanent injury to her. Respondent, as pleading, contends that the said Roy White on the occasion in question was not acting in the course of his employment and was performing no duties in the furtherance of the affairs, business, trade, or profession of said respondent; that he had deviated from and had not returned to the

scope and course of such employment, and was on a mission and performing activities solely personal to himself.

At the conclusion of all the testimony offered upon the trial of said case, Respondent, Strickland Transportation Company, made a motion for an instructed verdict, taking the position that petitioner had failed to establish by competent evidence that Roy White on the occasion in question was acting in the course and scope of his employment for respondent; that he was driving the truck in question without the knowledge and consent of said respondent. The trial court granted this motion. Roy White testified by oral deposition, but did not appear otherwise in the trial of said case, and did not interpose a defense in his behalf. After the court had granted the motion of Strickland Transportation Company for an instructed verdict, judgment was entered denying petitioner recovery against respondent, but awarding petitioner judgment against Roy White in the sum of $135,000.00. Roy White made no appearance in the Circuit Court of Appeals.

It is the position of respondent that the decision of the Circuit Court of Appeals in this case does not conflict with decisions of other Circuit Courts of Appeals on similar matters. The decision has not decided important questions of local law in a manner in conflict with decisions of the Texas Courts. Said Circuit Court has not decided important questions of general law in a manner that is

in conflict with weight of authority, and said opinion is not such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The trouble petitioner is having in this case stems from the apparent inability of herself and her counsel to apply the present announced rules of Texas law to the facts in the case at bar. This is strikingly portrayed on page 28 of petitioner's supporting brief, wherein the case of *Chisos Mining Company vs. Huerta*, reported 171 S. W. (2), page 867, is referred to and quoted from, and part of the quoted portion of the opinion there found being:

> "We believe that the rule appropriate to the peculiar facts of this case is that the relation of master and servant, temporarily suspended by the servant's departure from his work to accomplish a purpose of his own not connected with his employment, is reestablished when he has returned to the place where the deviation occurred, or to a place where in the performance of the duties he is required to be."

It is respondent's position that this is the settled Texas law as now pronounced on this question, and apparently attorneys for petitioner join us in this pronouncement. Also, it appears that the Circuit Court of Appeals which decided this case concurs in this view, since it cited this case in support of its decision in the case at bar.

The facts as to whether respondent's employee was acting in the scope and course of his employment on the oc-

casion in question and whether or not he had deviated from the course of his employment and if he had deviated, whether or not he had returned to the point of deviation or to a place where in the performance of his duties he should have been, are plain, simple, and undisputed, and are briefly as follows:

J. P. Welch, witness called by respondent on the trial of this case, in answer to Direct Interrogatories in part said:

"Q. State your name.

A. J. P. Welch.

Q. Where do you live?

A. Dallas, Texas.

Q. By whom are you now employed?

A. I am working for Herring Transportation Company. R. 8

Q. Did you live in Amarillo, Texas in the past?

A. I was only there about two months.

Q. By whom were you employed while there?

A. Strickland Transportation Company.

Q. What position did you hold as an employee of this concern?

A. I was general operations manager.

Q. During the time that you were manager for Strickland Transportation Company here in Amarillo, did you have occasion to hire a boy to work for this company by the name of Roy White?

A. Yes, sir.

R. 9

Q. I wonder if you would come over here somewhere where you can give the jury (referring to a map) where this happened. (By agreement, this is a map of a portion of the City of Amarillo, reflecting the streets, railroads, and highways, and the place where the defendant's place of business was, accident happened, etc.) Now, will you point out, please, sir, where Strickland Transportation Company's place of business was located on the date of the accident in question?

A. Here; approximately this location.

Q. Make a cross there with a lead pencil, please sir. That is number what on East Third Street?

A. 1507.

R. 11

Q. If he arrived down there at Hill Lines and there was no one to receive the freight, and it was between 12:00 and 1:00 o'clock, had you given any instructions to what he was to do with the truck and freight in the truck?

A. He had instructions to bring the truck and freight back to the dock.

R.12

Q. State whether or not when you employed Mr. White you gave him any instructions with reference to whether or not he could or could not use the company trucks down there for any type or mode of transportation other than company business?

A. They were emphatically given instructions that they were not to use them for any personal use; for business only for the company.

R. 9

Q. State whether or not he had been given positive instructions that he was not to drive this truck home to lunch.

A. He had been given definite instructions not to take the truck home to lunch.

R. 23

Q. Please show the jury the nearest route that would have gone to that place of business?

A. It would be go west to Grant and to 1101 Grant, and Hill's place is down in the 1300 block.

R. 12

Q. Then if the accident happened here where 10th Street intersects the Fort Worth Highway, in actual distance measuring 300 feet to the block, how far from Hill Transportation Company's trucking place of business there, or approximately how far was it, this boy was at the time of the accident?

A. Approximately a mile—16 or 17 blocks—approximately a mile.

R. 12

Q. If that boy had followed his instructions when he went down there to Hill Lines and there was no one there to accept the freight, what would he have done had he followed the strict company instructions and done what he had been instructed to do?

A. He would have come back off of Grant Street to Third and out to the office and left the freight there until after lunch until he could make the delivery of the freight.

R. 19

Roy White testified by oral deposition taken at the instance and request of petitioner. His testimony in part is as follows:

Q. Roy, have you been given any instructions about driving company trucks to lunch?

A. Well there was something said about that. That was against the company rules there to drive the truck; that was always the company rules.

R. 25

Q. This particular incident, isn't it a fact that you had been instructed, positively instructed by Mr. Welch, at no time to drive those company vehicles at any time other than on company business?

A. Yes, sir.

Q. Mr. Welch told you that on no occasion were you to drive a company truck to lunch or other than on company business?

A. That is right.

R. 26

Q. What time did you leave Strickland Transportation Company to go to Hill Lines?

A. It was between 11:00 and 11:30. I imagine it was closer to 11:30. R. 27

Q. What time did you arrive?

A. I made Navajo before I went on to Hill & Hill.

Q. Where was Navajo?

A. It is right here on the 1100 block.

Q. 1100 block on Grant Street, is that correct?

A. Yes, sir.

Q. Did you unload the freight that you had for Navajo?

A. Yes, sir.

Q. When you left the Navajo, where did you go?

A. Hill & Hill.

Q. How far is it from Hill Lines—From Navajo to Hill Lines Inc.?

A. About two blocks.

Q. What time did you say you arrived at Hill Lines?

A. A few minutes after 12:00 because the boys had took off for dinner.

Q. Then after you left—What did you do when you got to Hill Lines?

A. I got out to see if someone would check the freight to unload it but there was no one there.

Q. What did you do then?

A. Well, left and went on out to the house.

Q. Come here on this map and follow for me from the exact time you left Hill Lines until you arrived.

A. I backed out here on 13th and Buchanan.

Q. Which direction did you go from Hill Lines to Buchanan?

A. North from Buchanan.

Q. To Buchanan?

A. East to Buchanan.

Q. Which direction did you go from Hill Lines to Buchanan?

A. I believe it was west.

Q. How many blocks?

A. Four blocks. R. 28

Q. Then which direction did you go?

A. North.

Q. On what street?

A. Buchanan.

Q. How far north did you go?

A. I picked my sister up on 7th and Buchanan.

Q. You went what direction on Buchanan now?

A. I was going north.

Q. Where did you see your sister?

A. On 7th and Buchanan.

Q. Where had you started?

A. I had started out to the house to eat.

Q. Whose house?

A. My sister's.

Q. Where does your mother live?

A. North Grant.

Q. Did you go to your mother's?

A. No, sir.

Q. Why?

A. My sister said no one was out there.

Q. Where did you see your sister?

A. Seventh and Bunchanan.

Q. Did she get in the the truck with you?

A. Yes, sir.

Q. On the corner of 7th and Buchanan Street?

A. Yes, sir.

Q. Then which way?

A. I went north to Third and Buchanan.

Q. Proceeded on Buchanan north to Third Street. Then which way did you go after you got to Third Street?

A. East.

Q. How far on Third Street did you go East?

A. To Grand Avenue.

Q. And after you got to Grand Avenue which way did you go? R. 29

A. I went south to 6th and Grand.

Q. Then which way did you go?

A. East to Dallas.

Q. Is that where your sister lived?

A. Yes, sir.

Q. What did you do when you got there to your sister's?

A. I ate and came on to 10th Street and came on in.

Q. After you left your sister's place which way did you go?

A. South to 10th.

Q. When you got to 10th which way did you go?

A. I turned west.

Q. Where did you go then?

A. I was coming in on 10th to go to Hill & Hill Motor Freight and that is where the accident occurred. R. 30

Q. Now after you picked your sister up on the corner of 7th and Buchanan and proceeded south to Third Street, you say you turned west on third street and went to your sister's home?

A. I turned east.

Q. Turned east and went to your sister's home and in doing that you drove right by the Strickland Transportation place of business?

A. Yes, sir.

Q. You drove right on by. How many blocks east of Strickland Transportation Company's place of business is it to where your sister lives?

A. About 21 or 22 blocks.

Q. And at the time you drove by the Strickland Transportation Company place of business with your sister in the car and proceeded on east, you knew you were doing it in violation of strict company rules and regulations?

A. Yes, sir. R. 30

Q. What is the regular route that you would normally go from Strickland Transportation Company here to Hill Lines, Roy? Show me here on the map, will you?

A. We would come out on Third.

Q. Which way would you go on Third?

A. West.

Q. To what street?

A. Grant.

Q. Which way woud you turn on Grant Street?

A. South to Navajo.

Q. Isn't it true that you were instructed and you knew at the time you went to Hill Lines and you couldn't find anyone to unload this freight that you should have taken the truck back to the Strickland Transportation Company and left it?

A. Yes, sir.

Q. And it is true that you had instructions that you were not to unload freight unless someone was there to give you a receipt for it?

A. Yes, sir.

Q. But it was true that if there wasn't anyone there that you were to return the truck to Strick-

land Transporation until such time as someone was there?

A. Yes, sir.

Q. And had you gone back to the Strickland Transportation Company from Hill Lines at the time which way would you naturally have gone back? R. 31.

A. Gone to Third and Grant and east to Strickland Motor Company. R. 32.

As further evidence of the apparent erroneous application of the present rules of law announced by our Supreme Court of Texas with reference to deviation from the course of his employment by an employee, and more especially to the facts in the case at bar as herein just set out, and whether or not he is in the course of his employment while going to and from meals, petitioner cites as the leading case in Texas the case of *Gulf Refining Company of Texarkana vs. F.T.S. Ry. Company*, reported 261 S.W., page 169. The rules announced in this case might have been the Texas law for a time, but not for long.

The rules of law announced in the Gulf Refining Company case and kindred cases was refuted unquestionably in the case of *Bishop vs. Farm & Home Savings & Loan Association*, reported in 75 S. W. (2), page 285, opinion by the Court of Civil Appeals at Eastland.

In this case, plaintiff brought suit against defendant for damages and personal injuries; at the conclusion of the testimony of the plaintiff, the trial court instructed a verdict for the defendant and plaintiff appealed.

Briefly, the facts were that Willard Weaver was an employee of the defendant in the city of Abilene. On Saturday he left Abilene about 2:30 in the afternoon to spend the week-end with a friend in San Angelo. The visit had no connection whatever with defendant's business. Weaver had an appointment to meet a man on business in Abilene at 8:30 a.m. on Monday; he left San Angelo at 4:30 o'clock that morning with the expectation of returning to his hotel room in Abilene, changing his clothes and filling his appointment. On his way from San Angelo he became involved in an automobile collision, resulting in plaintiff's injuries. Evidence was sufficient to establish that Weaver was an employee of the defendant and that he was negligent in the manner of operating his car, and that plaintiff sustained substantial injuries resulting from the collision.

The court of Civil Appeals, in sustaining the trial court's acts in granting a motion for instructed verdict on the part of defendant, in part said:

> "It is a rule of general acceptation that if a servant steps aside from the master's business for some purpose not connected with his employment, but on a mission of his own, the relationship of master and servant is thereby suspended for the time and the master is not liable for his acts during such period. I. & G. N. Ry. Co. v. Anderson, 82 Tex. 516, 17 S.W. 1039, 27 Am. St. Rep. 902; I. & G. N. Ry. Co. v. Cooper, 88 Tex. 610, 32 S.W. 517; G. H. & S. A.

Ry. Co. v. Currie, 100 Tex. 136, 96 S.W., 1073, 10 L.R.A. (N.S.) 367; Van Cleave v. Walker, (Tex. Civ. App.) 210 S.W. 767; Main Street Garage v. Eganhouse Optical Co. (Tex. Civ. App.) 22 S.W. (2), 714; Reddick v. Prairie O. & G. Co. (Tex. Civ. App.) 51 S.W. (2), 735; Murphy v. Gulf Prod. Co. (Tex. Civ. App.) 299 S.W. 295; Bresnan v. Republic Supply Co. (Tex. Civ. App.) 63 S.W. (2), 1105. *It is urged by Appellant that even though it should be admited that Weaver went to San Angelo in the pursuit of his personal pleasure, the moment he forms the mental conception or determination to end it and re-embark on the business of his employer, he again resumed his duties and re-established the relationship of master and servant. This is the exact contention which was presented to this court in the recent case of Bresnan v. Republic Supply Company, supra. We there gave it careful consideration and declined to adopt it. It is, to our mind, an unsound proposition of law. The whole purpose of the trip was foreign to Appellee's business, and the return was but part of the trip, referable thereto, rather than to the business of the employer.*"

We think unquestionably all doubt as to what the law is in Texas regarding questions involved in the case at bar and about which petitioner is complaining is set to rest by the Commission of Appeals of the State of Texas, the opinion of said court being approved and adopted by the Supreme Court of this state in the case of *Southwestern Dairy Products Company vs. Defratees, et al*, 125 S. W. (2), page 282, the opinion being by Judge Hickman, who

was then a member of the Commission of Appeals, but is now Chief Justice of the Supreme Court of Texas. Briefly, the facts in this case are:

Suit was filed by L. C. Defratees and others against Southwestern Dairy Products Company for damage to taxicab resulting from collision with a truck belonging to Southwestern Dairy. Judgment was rendered in the trial court for the plaintiff.

The dairy company, by proper assignment of error, insisted that the evidence showed conclusively that at the time of the collision Henderson, its employee, was not acting within the scope and course of his employment, and for that reason the court erred in refusing its motion for instructed verdict in its favor after introduction of all the evidence was concluded.

The Court of Civil Appeals for the Second District, at Fort Worth, certified the following questions to the Supreme Court:

> "Should the assignment of error referred to above be sustained?"

The Dairy company maintained two places of business in San Antonio, one designated by witnesses as the main plant, located on Josephine Street, and the other located on Jones Street, where the wash rack was maintained for washing its trucks. The two places were several blocks distance from each other; the main plant was north of the

wash rack. It was the duty of Henderson to drive the trucks from the plant on Josephine Street to the other plant, and after washing them, to drive them back to the main plant ready for use. The hours of his employment lasted from 5:00 o'clock in the afternoon until 1:00 o'clock the night following. The collision occurred about midnight. Shortly before the collision, Henderson had started to drive the truck with which the cab collided from the main plant on Josephine Street to the wash rack on Jones, in order to wash it and then drive it back to the main plant. Instead of going directly to the wash rack, he drove the truck home to get his supper; his home was situated practically due west of the wash rack, and at a distance practically four times the distance between defendant's two places of business. After finishing his supper, he started to the wash rack for the purpose of washing the truck and then driving it back to the main plant where he got it. On the trip back to the wash rack, the collision occurred, at the intersection of Camden and Brooklyn Streets, WHICH WAS ABOUT SIX BLOCKS DISTANCE FROM THE DEFENDANT'S WASH RACK ON JONES STREET AND IN A NORTHEASTERLY DIRECTION THEREFROM, AND NOT ON THE ROUTE BETWEEN THE TWO PLANTS. *The use of defendant's trucks by its employees on missions of their own had been strictly forbidden, all of which was well known to Henderson, who testified that he drove the truck to his home to get his supper,*

well knowing that such was forbidden by his employer. Judge Hickman, in passing upon the certificate in part said:

> "The facts recited in the certificate show a complete departure by Henderson from the course of his employment; that is, from the service of his master. The relationship between an owner of an automobile and one employed by him to drive it is the same as that between master and servant generally. The liability of the owner for the negligence of the driver is to be determined by an aplication of the general rules of law governing the liability of master for the negligence of his servant. It is the firmly settled rule that when a servant completely departs from his work to accomplish some purpose of his own not connected with his employement, the relation of master and servant is thereby temporarily suspended, and the master is not liable for his acts during the period of such suspension. International & G. N. R. Co. v. Cooper, 88 Tex. 607, 32 S.W. 517; Branch v. I. & G. N. R. Co. 92 Tex. 288, 47 S.W. 974, 71 Am. St. Rep. 844; Galveston, *H.* & S. A. Ry. Co. v. Currie, 100 Tex. 136, 96 S.W. 1073, 10 L.R.A., N.S., 367; Hill v. Staats, Tex. Civ. App., 187 S.W. 1039, on rehearing Tex. Civ. App., 189 S.W. 85, error ref.; Bresnan v. Republic Supply Co., Tex. Civ. App., 63 S. W. 2d 1105 error ref.
>
> "Many cases which are relied upon as departures from or exceptions to the above rule may be grouped in two classes; first, those in which the departure was not wholly disconnected from the employment, but in which there was a mingling of the personal purposes of the servant with the doing of the mas-

ter's work; and second, those in which the departure was but a deviation and not a complete turning aside. THIS CASE DOES NOT FALL WITHIN EITHER OF THESE TWO CLASSES, BUT IS ONE OF COMPLETE DEPARTURE FOR A PURPOSE NOT CONNECTED WITH THE EMPLOYER'S BUSINESS AND NOT WITH THE EMPLOYER'S CONSENT. That being the nature of the case, then by practically all of the authorities, and certainly by the well established rule in this State as reflected by the cases cited, had this accident occurred while Henderson was on his way home to get his supper, Appellant would not have been liable for the injuries sustained.

"Is the master's liability to be governed by a different rule when, as in this case, the accident occurs on the return trip? There is respectable authority for the proposition that when a servant has completed the purpose for which he departed from his master's business and is returning to resume the duties of his employment, he is, while so returning, engaged in his master's business, and the master is therefore liable for injuries caused by his negligence on the return trip. Much has been written in support of this theory, and perhaps an equal volume against it. We shall add but little to what has been written upon the subject. WE FIND OURSELVES UNABLE TO ADOPT THE REASONING OF THE COURTS WHICH APPLY THIS THEORY. Of course, the purpose in the mind of Henderson while on the return trip was to take up the duties of his employment, but, the master's liability does not rest alone upon the the purpose in the mind of the servant. The test of liability is whether he was engaged in his

master's business, and not whether he purposed to resume it. It is equally true that Henderson owed the duty to his master of returning the car and resuming his employment, and while returning to the zone of his employment, he was discharging that duty, BUT THAT FACT DOES NOT FIX LIABILITY AGAINST THE MASTER. IT WAS HENDERSON'S OWN WRONG, IN DRIVING AWAY THAT CREATED THE DUTY TO RETURN, AND IN RETURNING HE WAS BUT UNDOING THAT WRONG. The return was referable to, and an incident of the departure. He was no more engaged in his master's business while returning to than while departing from his path of duty. Fletcher v. Meredith, 148 Md. 580, 129 A. 795, 45 A.L.R. 474; Model Laundry v. Collins, 241 Ky. 191, 43 S.W. 2d 693; Cannon v. Goodyear Tire & Rubber Co., 60 Utah 346, 208 P. 519; Bringman v. Zuckerman, 192 Mich. 624, 159 N.W. 316; Anderson v. Nagel, 214 Mo. App. 134, 259 S.W. 858; Colwell v. Aetna Bottle & Stopper Co., 33 R. I. 531, 82 A. 388.

"The question certified is answered in the affirmative."

The rules of law announced in the Bishop and Defratees cases, supra, are re-stated by our Supreme Court in the Huerta case, supra, when the court said:

"We believe the better rule to be that the relation of the master and servants temporarily suspended by the servant's departure from his work to accomplish a purpose of his own, and not connected with his employment, and is re-established when he has

returned to the place where the deviation occurred or to a place where in the performance of his duties he is required to be."

In the case of *Gammill v. Mullins*, 188 S. W. (2), 986, the Court pronounced the following rule of law:

"A servant completely departing from his work and engaged in a mission of his own, is no more engaged in his master's business in returning to than while departing from his path of duty."

Again, in the case of *Valencia vs. Western Union Telegraph Company*, a case by the Supreme Court of Texas, reported 172 S. W. (2), page 86, the Court in its opinion in part said, following the Defratees case:

"In the Defratees case, this court speaking through the Commission, pointed out that the employee was no more engaged in his master's business while returning to than while departing from his path of duty; that it was the employee's wrong in departing from his duty that created the duty to return, and that in returning he was but undoing the wrong."

In the 1941 Texas Jurisprudence Supplement, page 422, we find the following:

"The defendant may not be held liable as a general rule where the evidence shows that the driver was using the vehicle in violation of the defendant's instructions and without express or implied authorization, nor is any distinction to be drawn on the ground that the collision occurred while the driver was returning to the place where he was to resume

the performance of the service of his employer. Where driver deviates from his employment, the question to be resolved in such circumstances is, to-wit, the driver's deviation was of such a character to permit of a conclusion that it might have been foreseen by his employer and would not be consented to by him."

Blashfield's Cyclopedia of Automobile Law and Practice, Volume 5, page 199, Section 3042, we find the following:

"Although the eating of food may be necessary to keep up an employee's vitality so as to enable him to perform the duties of his employment, ordinarily servant cannot be said to be in his master's business or acting within the scope of his employment while eating or on his way to eat."

"Accordingly, the relationship of master and servant must ordinarily be deemed suspended while he is going to and from his meals, particularly where the servant is to board himself and the master is not liable for his servant's negligence while so traveling to and from meals, although the servant is driving the master's machine. This is especially applicable where servant's use of the master's car is against orders of the master."

In Blashfield's Cyclopedia of Automobile Law and Practice, Volume 5, page 212, Section 3151, we find:

"MAJORITY RULE, AND PROBABLY THE BETTER VIEW, IS THAT THE RELATION OF MASTER AND SERVANT IS NOT RESTORED UNTIL THE SERVANT HAS RETURNED TO

THE PLACE WHERE THE DEVIATION OCCURRED OR TO A CORRESPONDING PLACE, SOME PLACE WHERE IN THE PERFORMANCE OF HIS DUTIES HE SHOULD BE."

In the case of *Curry v. Geckly*, 195 Mo. 617, 198 Ia. 827, the court, in announcing its opinion, in part said:

> "There are courts that have recognized a rule that if an employee takes his employer's car for his personal purposes, while he is in the act of returning directly to the scene of the employment to resume his work, he is in the the employer's service. We refuse to follow the authorities so holding or to acquiesce in such a rule. The very decided weight of authority is to the contrary. It has been frequently held that where the employee, without the consent of his employer, leaves the scene of his employment and takes the employer's automobile for purposes solely his own, whether of business or pleasure, by so doing he steps entirely outside the scope of his employment, and that the employer is not liable for his negligent acts while so engaged, whether he be going from or returning to the place of his employment. He is no more engaged in the employer's business under such circumstances in getting back to the place of employment than he was in going away from it. He is serving his own purpose during all of such time. He lays aside his character of employee, and without any right or authority so to do, takes his employer's car for purposes wholly personal to himself. He does not resume in any legal or proper sense the service of his master merely when he returns to get back to his place of employment."

We think another case squarely in point with the case at bar is *Pesot vs. Yanda, et al,* reported 126 S. W. (2), page 240. The opinion is by the Supreme Court of Missouri, Division No. 2. Suit was by Pesot against Yanda and the Metropolitan Life Insurance Company for damages for personal injuries. Judgment was for the plaintiff against the named defendants; Metropolitan Life Insurance Company appealed, and the case was reversed.

Yanda was employed by Metropolitan Life Insurance Company as a collector. He was required to report to the office each morning to deposit or turn over to the cashier the collections he made the preceding day. He would then proceed on his day's work as directed by his employer. His regular route in going from his home to the office, and the one he would have followed on that occasion, but for the digression presently to be noticed, was to go north from his home to Park Avenue and then west on Park Avenue to the office. On the morning in question, instead of going by regular route to the office, Yanda took his wife to the Kroger Baking Company at 39th and Rutger Streets, where she was employed. That point is several blocks west and north of Grand and Park, where the accident happened. Leaving her, he then started east on Park Avenue toward the Company's office, to report and turn in the preceding days collections, which he had with him, and was thus on his way to the office when the collision occurred. The Court, in its opinion in part said:

"We deem it unnecessary to decide whether or not the relationship of master and servant, such as to invoke the doctrine of respondeat superior, existed as between Appellant and Yanda while the latter was performing the duties of his employment, BECAUSE, IN OUR OPINION, EVEN IF IT WERE CONCEDED THAT SUCH RELATIONSHIP EXISTED, YANDA WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT AT THE TIME AND PLACE OF THE ACCIDENT IN QUESTION. The situation must be viewed and the question of liability ruled with reference to that time and place. A master is liable for the acts of his employee only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of the wrong at the time of the injury, and in respect to the very transactions out of which the injuries arose. In going from his home to Kroger Baking Company to take his wife to her working place, Yanda was clearly on a mission of his own. Respondent says that when Yanda left his wife at the Kroger Baking Company and started from there to the office, he then and there returned to his employment, reassumed—if he had temporarily abondoned—the relationship of servant, and that from the moment he started back to the office, the relationship of master and servant between appellant and himself existed; therefore it existed at the time and place of the accident. We do not think so. It is argued that if he had not been going to the office to report he would not have been at Grand and Park Avenue, the place where the accident occurred, and hence could not have been involved in it, but neither would

he have been there at the time if he had gone from his home to the office in the discharge of his duties as an employee, by his usual and direct route, as by his own testimony he would have done had he not chose to perform a mission of his own before beginning the day's work for his employer."

Reiterating, we think the Circuit Court of Appeals properly decided this case, and that the trouble petitioner and her counsel are having is applying the rules of law as they now exist in Texas and in most every other jurisdiction to the facts in the case at bar.

The trial court sustained Respondent's motion for an instructed verdict upon two grounds; first, that petitioner had failed to establish by competent evidence that Roy White on the occasion in question was acting in the course and scope of his employment for Respondent; and second, that he was driving the truck in question without the knowledge and consent of respondent.

The trial court, by its action in sustaining the motion for an instructed verdict, found as a matter of fact that White had deviated from the course of his employment; that he had not returned to the point where the deviation occurred or to a corresponding place, some place where in the performance of his duties he should be. The Circuit Court of Appeals approved the action of the trial court in its action.

It was encumbent upon petitioner to plead and prove that White was acting in the scope and course of his employment on the occasion in question before she would be entitled to recover from respondent. This is a rule of law so universally adhered to that really citing authorities should not be necessary. In connection with this, however, we call the court's attention to the following cases:

McCoy v. Beech-Whitham Company, et al, 22 S. W. (2), 714;

Missouri-Kansas-Texas RR Company v. Salsman, 58 S. W. (2), 1026;

Marsh vs. American National Insurance Company, 16 S. W. (2), 333.

These cases held substantially as follows:

> "Where recovery is sought of master for injuries inflicted by servant, plaintiff must show that servant did wrong while acting within the scope of his employment."

The testimony of Welch and White is all of the evidence offered upon the trial of this case touching the question of whether or not White was acting in the scope and course of his employment on the occasion of the incident in question, and not only fails to establish that White was acting in the scope of his employment, but to the contrary, unequivocally, positively, and definitely proves

that White was not acting in the course and scope of his employment at the time of the incident in question.

The recorded testimony of Welch and White heretofore quoted stands uncontradicted and establishes the fact that White was instructed by Welch not to drive the truck in question other than on Company business, or home to lunch, that if he called at a client's place of business for the purpose of delivering freight and there was no one to accept same and sign a receipt therefor, he was to return the truck and freight to the place of business of respondent; that on the occasion in question, upon leaving Hill Lines, after being unable to locate someone there to receipt for the freight, White proceeded four blocks west to Buchanan Street, then 10 blocks north to Third Street, then 29 blocks east on Third Street, where he turned 3 blocks south on Grand Avenue to Dallas Street, and one block east on Dallas Street to his sister's residence for the purpose of having lunch. After having said lunch, he returned one block west on Dallas Street to Grand Avenue, four blocks south on Grand Avenue to Tenth Street, and proceeded West on Tenth Street to where same intersects with the Fort Worth and Dallas highway, where the accident occurred, which point is approximately one mile west and three blocks north of the Hill & Hill Motor Freight Lines; that the ordinary, usual route that White would have travelled in proceeding from 1507 East Third Street, Respondent's place of business, to Hill Motor Freight Lines

for the purpose of delivering freight would be to go west from respondent's place of business on Third Street to Grant, a distance of four blocks, then turn south on Grant Street and proceed a distance of ten blocks to Hill & Hill Motor Freight Lines.

The query then arises, "At the time the accident occured, had White returned to the place where the deviation occurred, or to a place where in the performance of his duties for his master he should have been." The uncontradicted testimony in this record does not warrant an affirmative answer to this inquiry. White's deviation started as he proceeded east on Third Street, when he passed his master's place of business at 1507 East Third Street, where, under positive instructions, he should have left the truck and freight, and proceeded to his lunch. Upon returning from lunch, he should have procured the truck and freight and then gone four blocks west on Third Street and proceeded 10 blocks south on Grant Street to Hill Motor Freight Lines, this being the regular, ordinary, usual and direct route used to proceed from respondent's place of business to Hill Motor Freight Lines. White did not do this; he proceeded on from the place of deviation, to-wit, respondent's place of business, 21 blocks east on Third Street to Grand Avenue, 3 blocks south on Grand Avenue to Dallas Street, and 1 block east on Dallas, to his sister's residence where he had lunch. After finishing his lunch, he proceeded west one block on Dallas

Street to Grand Avenue, south on Grand Avenue 4 blocks to Tenth Street, and west on Tenth Street to where the Fort Worth highway intersects said street, where the accident occurred, which was substantially a mile from where Hill Motor Freight Lines is located. Certainly at no time from the instant White passed his employer's place of business on Third Street proceeding east until the time of this accident was he at the place where the deviation occurred or at a place where in the performance of his duties for his master he should have been. To the contrary, he was one mile east of Hill Lines, and 12 blocks east and 7 blocks south of his employer's place of business. For him to have been in the place where the deviation occurred he would have had to be at respondent's place of business located at 1507 East Third Street, this being the place where the deviation began. For him to have been at a place where in the performance of his duties for his employer he should have been, he would have had to be on Third Street somewhere between his employer's place of business at 1507 East Third Street, and Grant Street, a distance of four blocks, or somewhere on Grant Street between the point where same intersects with East Third, and Hill Motor Freight Lines, a distance of ten blocks. As this record reflects, the place where the accident occurred is substantially a mile south and east of any of the places where White should have been for it to be said that he was in the scope and course of his employment on the occasion in question.

Judge Hickman held that Henderson was not in the scope and course of his employment, yet the record in that case reflects that Henderson was only 6 blocks from the wash rack where he should have been washing the car at the time of the accident, and was only about 4 blocks from the route he should have been traveling in the conduct and carrying on of his master's business.

In its supporting brief, counsel for petitioner cites the case of *Maryland Casualty Company vs. Levines*, reported 67 Fed. (2), 816, and contends it supports their theory in the case at bar. The record in the Levines case clearly reflects that the employee at the time he was killed had returned from his deviation and was on the direct route from his employer's place of business to the place he had been sent by said employer, and the Circuit Court of Appeals for the 5th Circuit in so holding in its opinion in part said:

> "The jury found upon ample supporting evidence that Levine was killed on the direct route to the place where he had been sent on Company business."

While this case was being argued by counsel for petitioner before the Circuit Court of Appeals, this fact was called to the attention of petitioner's counsel by the presiding judges and the distinction between the facts in the Levine case and the case at bar was made.

The Defratees case, supra, clearly overrules the holding in the Gulf Refining Company of Texarkana case,

supra, and all cases in Texas announcing similar rules prior to the Defratees case, and in so doing, as set forth in the cases and text books previously referred to in this brief, which in our opinion in substantially all respects save and except the Gulf Refining Company case, supra, and other cases holding in accord therewith, up to the time of the Defratees case, are in accordance with the holding of the cases and textbooks referred to in the supporting brief of petitioner. This is pointedly brought out wherein they cite the *Southwestern Bell Telephone and Telegraph Company vs. Quick*, 149 Southern, 109. This case in part, in its opinion, said:

> "In cases where the deviation is slight and not usual, the court may and often will as a matter of law determine that the servant was still executing his master's business, *so too, where the deviation is very marked and unusual the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact to be left to the jury or other trier of such questions.*"

We think each case cited by petitioner in her supporting brief is clearly distinguishable and can be easily reconciled with the law as applied to the facts in the case at bar; this is forcefully portrayed where petitioner on page 47 of her supporting brief recites from 5 Texas Jurisprudence page 778 the following:

> "If within the course of his employment an employee is permitted to use his employer's vehicle to facilitate the performance of necessary errands of his own, he does not, while on this errand cease to be an employee, but is still an employee and the legal principal of respondeat superior applies."

This rule is not applicable in the case at bar. Positive and uncontradicted testimony reflects that White was not permitted to use the truck in question for the purpose of going to lunch and in the course of his employment was not permitted on any occasion to use the truck in question to facilitate the performance of a necessary errand of his own.

The above is further portrayed by the fact that in the supporting brief, counsel for petitioner cites the case of *Standard Coffee Company vs. Trippett*, 108 Fed. (2), 161, and quotes from such opinion. In this case, the court, in passing upon the question, in part said:

> "In the case at bar, McAdams was the only person who knew the true purpose of the trip to Lufkin. He testified that he was going back after a razor; the day was Thursday and he would return to his home on Saturday. One may conclude that he would not stand in need of the razor to any great extent until he returned home. Moreover, this statement about driving over 40 miles for a razor was certainly discredited by the introduction of his prior written statement that he was going back to pick up some special blend of coffee."

The court took the position that this testimony was not so clearly positive and unequivocal as to warrant as a matter of law the overturning of the presumption arising from the ownership and operation of the automobile.

We have no such doubts, or equivocations, under the testimony in the case at bar. White's uncontradicted testimony is that he used the truck in question for the purpose of going home to lunch and that he had been positively instructed not to so use said truck at any time. He was corroborated in the statement that he had been instructed not to use the truck for the purpose of going home to lunch by Welch, manager for his employer, who hired him. Certainly this is clear, positive, and unequivocal testimony, that is in no way clouded or questioned. Could it be said that the trier of the facts would be in a position to say that they just did not believe White and Welch and would therefore conclude that White was in the course of his employment? Since White and Welch were the only parties testifying regarding whether or not he was in the course of his employment, what testimony would warrant the trier of the facts to conclude that White was acting in the scope and course of his employment? Judge Hutchinson, who sat as one of the judges in the Standard Coffee Company case and signed the decision and opinion, we think very clearly observes what the majority of the court had in mind that would distinguish it from the case at bar when he said:

"The error of the majority springs, I think, from its treating as evidence and giving evidential effect to plaintiff's prior contradictory statement, introduced and admitted for impeachment purposes alone."

In Texas, proof of ownership and driving of a vehicle raises the presumption that the driver was acting in the course of the employment of the owner on the occasion in question. This presumption, however, is put to flight by the introduction of positive and unequivocal testimony by the owner as to the acts of the driver on the occasion in question. We think an excellent statement of the Texas rule on this point is found in the case of *Houston News Company vs. Shavers*, 64 S. W. (2), 384, wherein the court in its opinion in part says:

"Evidence that the truck with which the injury was committed belonged to the News Company, that it was being driven by one regularly in its employ, in the absence of evidence to the contrary raises a presumption that such servant was engaged in the news company's business at the time of such collision. This, however, is a mere rule of procedure, and the presumption vanishes when positive evidence to the contrary is introduced. The presumpiton grows out of the fact that not infrequently the evidence necessary to establish the character of the mission on which the servant was engaged is exclusively within the possession of the Defendant. The effect of the rule is to smoke out the defendant and compel him to disclose the true facts with his knowledge. When, however, he discloses the true facts within his possession, and such evidence is positive to the

effect that the servant was not engaged in the master's business at the time of the injury, the presumption is nullified and the burden is then upon the plaintiff to produce other evidence or his cause fails."

Other cases supporting this rule of law are:

Alfano vs. International Harvester Company, 121 S. W. (2), 466;

Hudson vs. Ernest Motor Company, 115 S. W. (2), 1167;

Texas News Company vs. Lake, 58 S. W. (2), 1044.

Petitioners, through her attorneys, further takes the position, we think erroneously, that since the evidence showed White was regularly in the employ of respondent and driving a truck belonging to them at the time of the accident, this testimony raised the presumption that White was acting in the course of his employment and that therefore the jury did not have to believe and rely upon the rebuttal testimony offered by respondent, apparently taking the position that such testimony was not clear, positive, and unequivocal, and since they contend it came from interested witnesses, and cite the *Standard Coffee Company vs. Trippett*, and the *Broaddus vs. Long* cases.

Their position in this matter, we think, is untenable, first because the testimony offered by respondent to rebut and overcome the presumption that White was acting in the course of his employment on the occasion in

question 'we think' was wholly uncontradicted, clear, positive, and unequivocal; that there were no circumstances in evidence tending to discredit or impeach such testimony; therefore, full effect should be given thereto.

We have no quarrel with the position taken by attorneys for petitioner that the rule of law in Texas that the credibility of an interested witness and the weight to be given his testimony are questions for the determination of the court or jury trying the case. There are exceptions to this rule, however.

In the case of *Bowers vs. Bingham*, 159 S. W. (2), 756, the Court in its opinion in this case in part said:

> "The general rule as established by our Supreme Court is that credibility of an interested witness and the weight to be given his testimony are questions for the determination of the court or jury trying the case, notwithstanding such testimony may be uncontroverted and such witness unimpeached.
>
> "*This rule, however, has its exceptions; when the testimony of such an interested witness is wholly uncontradicted, is clear, positive, and unequivocal on the point at issue, and there are no circumstances in evidence tending to discredit or impeach such testimony, conclusive effect should be given thereto.*"

Great Southern Life Insurance Company vs. Dorough, Texas Civil Appeals, 100 S. W. (2) 772;

Texas Employers' Insurance Association vs. Roberts, 139 S. W. (2), page 8.

In the case of *Moody vs. Kimball*, 173 S. W. (2), 270, the Court, in its opinion in part said:

> "We realize that there is a general rule that the testimony of an interested party to a suit, though it is not contradicted by any other witness, does no more than raise an issue for the determination of the jury, *but there is an apparent exception to this rule where the testimony of an interested witness is not contradicted by any other witness or attendant circumstances, and same is clear, true and positive, and free from contradictions, inconsistencies, and circumstances tending to cast suspicion upon it, in such case it is held that an instructed verdict may be given on such testimony.*"

This same rule of law is announced in *Lankford vs. El Paso Packing Company*, 1 S. W. (2), 476, and many other cases cited from the cases hereinabove quoted from.

Without again quoting the testimony of White and Welch on the point involved, since same has been heretofore set out and referred to, we think such testimony clearly falls within the exception of the rule above set forth.

Second, we think the rule attorneys for petitioner are trying to apply here is not applicable, for the reason that if the testimony of the interested party is corrobarted, then the rule is not applicable.

At the time they gave their testimony, White by deposition prior to the date of the trial, and Welch at the time

of the trial, neither of said individuals were in the employ of respondent, both having long since left such employ; therefore, under the rules, which we will hereafter discuss, we think neither of these individuals were interested parties. Certainly Welch was never an interested party by reason of the fact that he was not in the employ of respondent at the time of giving his testimony, and was not a party to the suit.

In the case of *Koenig vs. Marti, et al*, reported 103 S. W. (2), page 1023, the court in its opinion in part said:

> "In the group of assignments which we have discussed in this class there is one which complains that the testimony of appellee, she being an interested witness, could not be taken as conclusive proof; that the appellant was entitled to have the jury pass upon its weight and her credibility. The assignment announces a correct principal of law in some cases, but when the testimony of an interested witness, as in this case, is corroborated by other testimony, such as by an adverse party, and the uncontroverted written assignments, the rule is not applicable."

In the case of *Robelin vs. Brooke*, 201 S. W. (2), page 98, the court in part said:

> "A jury cannot entirely disregard the uncontradicted testimony of an interested witness when it is strongly corroborated by cogent facts and circumstances in evidence."

In the case of *Pyland vs. Sayers*, 148 S. W. (2), 450, the court announced the following rule:

"While interested witness's testimony is not conclusive of fact issue involved and may be disbelieved, uncontradicted, clear, positive, and unequivocal testimony cannot be disregarded, and judgment contrary thereto rendered in the absence of evidence tending to impeach or discredit such testimony, especially where there is evidence to corroborate it."

We think White's testimony was corroborated by the facts and circumstances and also by Welch, and that therefore the rule contended by attorneys for petitioner above referred to is not applicable.

Third: As has heretofore been reflected, White testified by deposition; at the time he gave this testimony he was no longer in the employ of respondent. Welch testified upon the trial of the case; at the time of his testimony he was no longer in the employ of respondent. It has been held in this state, under these circumstances, that neither White nor Welch would be considered interested parties or witnesses. In the case of *Alfano vs. International Harvester Company of America*, 121 S. W. (2), 466, the court in part said:

"That the entire nature of the defensive testimony may have proceeded from interested witnesses does not vary the rule if in fact there be a full disclosure (citing cases), there being nothing to cast any suspicion upon the verity of defense witnesses. However, Mr. Barney was clearly not an interested witness, insofar as concerned appellee. Upon the trial, he took the stand in his own behalf (he having been

> sued along with his employer), and was not then an employee or maintaining any character of relationship with the Company. On the other hand, at that time it was in the interest of Mr. Barney to establish a basis of employment with appellee in order that a possible adverse verdict might be shared."

In the case of *Pyle vs. Phillips*, 164 S. W. (2), page 569, the court announces the following rule:

> "Where witness was no longer an employee of defendant at the time of the trial he was a disinterested witness, and hence his testimony could not be completely disregarded."

Apparently the rules of law announced in these two cases clearly overturn any question that White or Welch either were interested parties or witnesses to the extent that their credibility should have been submitted to the jury.

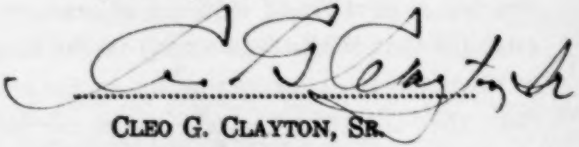
We respectfully submit that the evidence in this case, and the apparently uncontradicted Texas law applicable thereto, reveals that White had deviated from the course of his employment; that he had not returned to the place of deviation or to a place where in the performance of his duties for his employer he should be; that he was driving and operating the truck belonging to respondent on the occasion in question in positive violation of instructions given him by respondent; that the presumption raised upon the trial of the case that White was acting in the scope and course of his employment on the oc-

casion in question was clearly overcome by clear, unequivocal, unrebutted, positive testimony of disinterested parties to said cause of action; that this being true, there was not a scintilla of evidence offered by petitioner to establish that White was acting in the scope and course of his employment for respondent on the occasion in question; that therefore the trial court correctly instructed the verdict for respondent and the Circuit Court of Appeals correctly affirmed its action in doing so.

We think a reading of the cases in this brief and a comparison of same with the applicable cases in petitioner's supporting brief conclusively establishes that the Fifth Circuit Court of Appeals has in no way refused to follow the decisions of the State of Texas on the points of law involved in this case. To the contrary, we submit that they are in all respects harmonious, and since Texas law is applicable and governs the court's action in this case, we respectfully submit that petitioner's ap-

plication for Writ of Certiorari should be in all things denied.

Respectfully submitted,



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